

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUL 29 2011

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2011-0057-PR
	)	DEPARTMENT B
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
ALVIN CHESTER HILL,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20081524

Honorable John S. Leonardo, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney  
By Jacob R. Lines

Tucson  
Attorneys for Respondent

Alvin C. Hill

San Luis  
In Propria Persona

V Á S Q U E Z, Presiding Judge.

¶1 Petitioner Alvin Hill seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., in which he alleged ineffective assistance of counsel and prosecutorial misconduct. "We will not

disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Hill has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Hill was convicted of aggravated assault with a deadly weapon, aggravated assault causing serious physical injury, and two counts of endangerment. The charges arose from Hill's firing of a gun inside a club, which was followed by a second, police-involved shooting outside the club, in which Hill was not involved. The trial court imposed presumptive, concurrent terms of imprisonment, the longest of which were 9.5 years. This court affirmed his convictions and sentences on appeal. *State v. Hill*, No. 2 CA-CR 2009-0007 (memorandum decision filed Jan. 15, 2010). While his appeal was still pending, Hill filed a notice of and petition for post-conviction relief. But, because the notice was not signed by either Hill or an attorney representing him, the trial court dismissed it. Hill filed another notice and petition less than a month later, which the court dismissed "without prejudice" as untimely.

¶3 In February 2010, Hill filed yet another notice and petition. In it, his court-appointed counsel stated she had "reviewed the transcripts and all relevant documents" and was "unable to discern any colorable claim upon which to base a Petition for Post-Conviction Relief." She requested an extension of time to allow Hill to file a pro se petition and the court granted the request. *See* Ariz. R. Crim. P. 32.4(c).

¶4 In his pro se petition, Hill alleged trial counsel had been ineffective in cross-examining witnesses, in failing to object frequently enough, and, primarily, in failing "to conduct an adequate investigation and prepare for trial." Hill also alleged

prosecutorial misconduct, claiming the prosecutor had “made factual assertions he well knew were untrue.” The trial court summarily denied relief, concluding Hill’s claim of prosecutorial misconduct was precluded because he had failed to raise it on appeal, and Hill had failed to show the prejudice required to establish a colorable claim of ineffective assistance of counsel.

¶5 On review, Hill alleges the trial court’s “refusal to order disclosure” of certain materials he had requested during the Rule 32 proceeding violated his due process rights. He also argues the court erred in concluding he had not established prejudice arising from counsel’s performance, and in finding his claim of prosecutorial misconduct precluded because the claim was based on “extra-judicial records.” Hill’s arguments lack merit for several reasons.

¶6 First, the trial court clearly identified the claims of ineffective assistance of counsel Hill had raised and resolved them correctly in a thorough, well-reasoned minute entry. We see no reason to repeat that reasoning here. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993) (when trial court correctly ruled on issues raised “in a fashion that will allow any court in the future to understand the resolution[, n]o useful purpose would be served by this court[’s] rehashing the trial court’s correct ruling in a written decision”). Notably, however, much of the evidence Hill claims his attorney should have investigated and introduced related to the police-involved shooting outside the club, which, according to Hill’s testimony at trial, took place after he had fired the gun inside the club. Nothing in his testimony indicated he had seen anyone else with a gun in the club when he fired the shots that gave rise to the

charges against him. Rather, he testified he fired the shots after someone hit him in the head with a glass.

¶7 And, although Hill averred in the Rule 32 proceeding that he had told his attorney “that at least one of [his] attackers was armed with a gun and discharged his weapon inside the club,” he did not specify this had happened before he fired his own gun, nor did he aver his trial testimony was inaccurate. Thus, the evidence Hill claims his attorney failed to discover would not have been relevant to supporting his justification defense. *See State v. King*, 225 Ariz. 87, ¶ 12, 235 P.3d 240, 243 (2010) (In claim of self-defense “the sole question is whether a reasonable person in the defendant’s circumstances would have believed that physical force was ‘immediately necessary to protect himself.’”), *quoting* A.R.S. § 13-404(A); *cf. State v. Fish*, 222 Ariz. 109, ¶ 36, 213 P.3d 258, 270 (App. 2009) (In support of claim of self-defense “specific act evidence is not admissible to show a defendant’s state of mind unless the defendant was aware of the victim’s prior acts at the time of the altercation.”).

¶8 Next, even assuming Hill’s claim of prosecutorial misconduct is not precluded by his failure to raise it on appeal<sup>1</sup> because it is based, at least in part, on extra-judicial material, *see State v. Blazak*, 131 Ariz. 598, 604, 643 P.2d 694, 700 (1982), the trial court did not abuse its discretion in dismissing Hill’s petition, *cf. State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (trial judge’s proper conclusion for wrong reason irrelevant; appellate court obliged to affirm trial court’s ruling if legally correct for

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<sup>1</sup>Rule 32.2(a)(3) provides that a defendant is precluded from relief based on any claim “waived at trial, on appeal, or in any previous collateral proceeding.”

any reason). Hill's claim of prosecutorial misconduct was based on the prosecutor's assertion that the shooting Hill committed and the shooting outside the club "involve[d] completely different parties." Hill alleged the prosecutor knew the two shootings were "linked," "a continuum," and "involved the same parties" and the prosecutor "made false factual assertions" to the contrary at trial.

¶9 Misconduct is defined as conduct that "is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial." *Pool v. Superior Court*, 139 Ariz. 98, 108, 677 P.2d 261, 271 (1984). "To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998), quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). Accordingly, "[p]rosecutorial misconduct constitutes reversible error only if (1) misconduct exists and (2) 'a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial.'" *State v. Morris*, 215 Ariz. 324, ¶ 46, 160 P.3d 203, 214 (2007), quoting *State v. Anderson*, 210 Ariz. 327, ¶ 45, 111 P.3d 369, 382 (2005).

¶10 In this case, we cannot say any alleged misconduct "so infected the trial with unfairness" that it denied Hill a fair trial or that it could have affected the jury's verdict. As discussed above, the shooting outside the club took place after Hill had already committed his offense. And, again, he has not claimed that he saw anyone else with a gun before firing his own or that anything related to the outside shooting

contributed to his decision to fire his own gun. Thus, even accepting Hill's assertions as true, we cannot say that any statements by the prosecutor related to the outside shooting could have affected the jury's apparent disbelief that Hill had acted justifiably. Additionally, the one specific statement by the prosecutor to which Hill points, that the two shootings involved "different parties," was not a false statement. Even if some of the people involved may have known each other, none of the individuals involved in each shooting were the same.

¶11 Finally, we address Hill's discovery-related arguments. In July 2010, before he had filed his pro se petition, Hill filed several motions requesting, inter alia, reports and transcripts apparently relating to the Tucson Police Department's investigation of the shooting outside the club, the deposition of a club patron, and various videos and photographs. The trial court granted the motion as to "all items contained in the record and transcripts" and denied it as to all other items, correctly pointing out "the court may grant disclosure in a Rule 32 proceeding only upon a showing of good cause, which can only appear once the petition has been filed." *See Canion v. Cole*, 210 Ariz. 598, ¶ 10, 115 P.3d 1261, 1263 (2005).

¶12 Hill subsequently filed his pro se petition and renewed his motions both in his reply to the state's response to his petition and in a separately filed motion. The trial court implicitly denied the motion in dismissing Hill's petition. We cannot say the court abused its discretion in so ruling. Although Hill had filed his petition by the time he renewed his motions, thereby providing context for his discovery request, *see id.*, as discussed above, he did not state a colorable claim for relief, and the court therefore did

not need to order disclosure of additional materials, *see id.* ¶ 12. And again, even assuming Hill’s allegations were correct, and the extra-judicial material contained information about another gun in the club, Hill’s testimony did not suggest he was aware of any other gun when he decided to fire his own, making any evidence of another gun irrelevant to his defense, as discussed above.

¶13 For the foregoing reasons, although we grant the petition for review, we deny relief.

/s/ Garye L. Vásquez  
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa  
PHILIP G. ESPINOSA, Judge

/s/ Peter J. Eckerstrom  
PETER J. ECKERSTROM, Judge